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INCREASE IN THE STRENGTH OF THE HIGH COURT.

The appointment of two additional Judges to the High Court for a period of two years from the re-opening of the Court after the summer recess renders it desirable to take account of the growth in the strength of the Bench from time to time and the causes responsible therefor. Prior to the establishment of the High Court, there were functioning at Madras, the Sadar Diwani Adawlat and the Supreme Court. The former consisted originally of the Governor and the Members of his Council.[1] It was the chief court of appeal in civil matters from the decisions of the courts in the mofussil. It had also a certain amount of original jurisdiction by virtue of the power given to it to take over to its file, suits exceeding Rs. 45,000, from the zillah Courts, and when the latter were replaced by provincial courts, the original jurisdiction was extended to suits over Rs. 10,000. Regulation 4 of 1806 vested the functions of the Sadar Diwani Adawlat in two regular Judges, not being members of the Executive, with the Governor as President. The latter was however to exercise only an occasional power of superintendence over the other Judges. In 1807, the Sadar Diwani Adawlat was reconstituted with a member of the Governor's Council as Chief Judge and three Puisne Judges to be chosen from among the Company's servants. By Regulation 3 of 1825, the Governor-in-Council was given power to appoint additional Judges whenever needed. The arrangement continued in force till the Court was absorbed in the High Court in 1862.

A statute of 1800, 39 and 40 Geo. III, c. 79 provided for the constitution of a Supreme Court in Madras, similar to the one created at Calcutta and the Charter constituting the Court was issued in 1801. S. 2 of the statute declared that it shall be lawful for "His Majesty, his heirs and successors, by Charter or Letters Patent under the Great Seal of Great Britain, to erect

1. *See* S. 2 of Madras Regulation 5 of 1802.

and establish a Supreme Court of Judicature at Madras....... to consist of such and the like number of persons to be named from time to time by His Majesty, his heirs and successors.'' Clause (6) of the Letters Patent of the Supreme Court however prescribed that the number of Judges should be only 3 including the Chief Justice, the qualifications of the Judges being that they should be Barristers in England or Ireland of not less than five years' standing. It stated: "And we do further will, ordain and appoint, that the said Supreme Court .... shall consist of and be holden by and before one principal Judge who shall be and be called the Chief Justice .... and two other Judges who shall be and be called Puisne Judges ...... which Chief Justice and Puisne Judges shall be Barristers in England or Ireland of not less than five years' standing, to be named and appointed from time to time by us, our heirs and successors, by Letters Patent under our and their Great Seal of Great Britain whilst such seal shall be used, and afterwards under our and their Great Seal of the United Kingdom of Great Britain and Ireland and such Chief Justice and Puisne Judges and all and every of them shall hold their said offices severally and respectively during the pleasure of us, our heirs and successors, and not otherwise''. The statute 24 and 25, Vic. c. 104 provided for the creation by Letters Patent of a High Court of Judicature at Madras among other places, into which were to be merged the Supreme Court and the Sadar Diwani Adawlat. S. 2 of the Act dealt with the constitution of the High Court and prescribed that it shall consist of a Chief Justice and as many Judges not exceeding 15 as Her Majesty from time to time think fit and appoint. All the Judges including the Chief Justice were to be recruited from (1) Barristers of not less than five years' standing, or (2) Members of the Covenanted Civil Service of not less than ten years' standing and who shall have served as zilla Judges or shall have exercised the like powers for at least three years of such period, or (3) Persons who have held judicial office not inferior to that of Provincial Sudder Ameen or Judge of a Small Cause Court for a period of not less than five years, or (4) Persons who have been pleaders of a Sudder Court or High Court for a period of not less than ten years, etc. It was laid down by a proviso that not less than one-third of the strength of the High Court including the Chief Justice should be Barristers and not less than one-third should be members of the Covenanted Civil Service. The Judges of the Supreme Court and the permanent Judges of the Sadar Diwani Adawlat at the time of the constitution of the High Court were to be *ipso facto* Judges of the High Court. Thus at the time of the creation of the High Court, two Judges who were functioning in the Supreme Court and four who were in the Sadar Court automatically became Judges of the new High Court. In that way the High Court started with six Judges. The Letters Patent constituting the

Court was issued on 26—6—1862. Clause (2) thereof declared: "We do hereby appoint and ordain, that the said High Court of Judicature at Madras shall, until further or other provision shall be made by us or our heirs and successors in that behalf, in accordance with the recited Act, consist of a Chief Justice and five Judges". S. 17 of the Act had also provided that "it shall be lawful for Her Majesty, if Her Majesty shall so think fit at any time within three years after the establishment of any High Court under this Act by her Letters Patent to revoke all or such parts or provisions as Her Majesty may think fit of the Letters Patent by which such Court was established, and to grant and to make such other powers and provisions as Her Majesty may think fit". S. 1 of 28 Vic. c. 15 extended the time for such revocation of the Letters Patent till 1—1—1866 and in fact, within that time, on 28—12—1865, the Letters Patent of 1862 was superseded and a fresh Letters Patent issued. The latter did not contain any provision fixing the strength of the High Court with the result that the limit prescribed by the earlier Letters Patent stood removed and the matter was left to be governed by the provisions of the statute 24 and 25 Vic. c. 104, namely, that the High Court shall consist of a Chief Justice and as many Judges not exceeding 15 as the Crown may from time to time think fit and appoint. The hands of the Crown being thus unfettered in the matter, it had ample powers to appoint any number of Judges not exceeding 15 including the Chief Justice. As a matter of fact, though to start with, the High Court had six Judges, a Chief Justice and five Puisne Judges, the number fell to five sometime later. But in 1888 a fifth Puisne Judge was appointed to "assist in working off the heavy and increasing arrears in the Court". A sixth was added in 1907 and a seventh in 1909. In 1912 the strength of the Court was increased by the addition of two temporary Judges and from July, 1914, there were four temporary Judges. Subsequently the permanent strength of the Court was raised first to 12, and then to 14. S. 101 (2), proviso (*ii*) of the Government of India Act, 1915, fixed the maximum number of Judges for all High Courts at 20, but S. 220 of the Government of India Act, 1935, has varied the provision and enacted that every High Court shall consist of a Chief Justice and such other Judges as His Majesty may from time to time deem it necessary to appoint, provided that the Judges so appointed together with the additional Judges that may be appointed by the Governor-General under S. 222 (3) shall at no time exceed in number such maximum number as His Majesty in Council may fix in relation to that Court. By the Government of India (High Court Judges) Order, 1937, the sanctioned strength of the Madras High Court excluding the Chief Justice but including the additional Judges that could be appointed under S. 222 (3) is 15. Thus under the constitution established by the Act of 1935, the Madras High Court can

have 16 Judges inclusive of the Chief Justice and that limit has now been reached with the appointment of the additional Judges recently made. As regards eligibility for Judgeship and the necessity for a certain proportion of the Judges being Barristers or members of the Covenanted Civil Service, the provisions contained in 24 and 25 Vic. c. 104 were retained *mutatis mutandis* till 1935. The Government of India Act of that year has, while leaving substantially unaffected the qualifications prescribed, swept away the former provisions reserving a certain percentage to Barristers and Members of the Indian Civil Service. It has also removed the rule that the Chief Justice should be a Barrister. The above survey indicates how in course of time the strength of the High Court has gradually risen from 6 to 16. Another notable feature is that additions to the Bench sanctioned as a temporary measure in the first instance have in the past generally tended to become permanent.

Addition to the strength of the High Court had always two objects to achieve, namely, to clear off the accumulated arrears and to cope with fresh institution. *Apropos* the conditions in England, Lord Loreburn, L.C. once observed: "I am most anxious to see the Courts of this country made efficient business instruments, so that we may be able to say to suitors, 'If you come to-morrow we will hear you the day after' ". The ideal is one which is certainly desirable for our province as well, but the real and the ideal remain far apart and the steady accumulation of arrears has been felt to be a tantalising problem to solve. Causes contributing to the increase in arrears and remedial measures that might be adopted have been pointed out in the columns of this journal on many occasions. Rise in population, multiplication of laws and regulations, growth of commerce, industrialisation of the country, are some of the causes likely to augment the volume of litigation. But what with the constitution in an increasing measure of special tribunals with summary procedure such as the Panchayat Courts, Debt Conciliation Boards, etc., levy of enhanced rates of court-fee, adoption of rules for disposal of second appeals by single Judges and similar expedients, general economic depression during the last decade, these and other factors have on the other hand produced an impression that the volume of litigation is steadily coming down and that there can be no warrant for the addition to the strength of the High Court at present. A comparison of the statistics for the two years 1914 and 1939[1]—each year witnessing the commencement of a great world war—is fairly instructive.

1. Figures regarding Criminal work, Income-Tax References, Insolvency Petitions, Miscellaneous Petitions, etc., have been left out. The statistics for 1914 have been taken from pp. 9-10 (Journal) 30 M.L.J. and those for 1939, from p. 4, Statistics of Civil Courts in the Madras Presidency for 1939.

Description.	Institution.		Disposal.		Arrears at the end of the year.	
	1914	1939	1914	1939	1914	1939
Suits ..	465	307	551	355	381	479
Appeals from original decrees of mofussil courts.	433	343	513	495	937	1137
O. S. Appeals ..	118	67	75	78	157	78
C. C. C. Appeals..	29	79	14	138	46	98
Second Appeals ..	2628	1107	2488	1451	4631	2624
L. P. Appeals ..	410	76	345	155	333	61
C. M. A's. ..	418	562	389	603	592	727
C. M. S. A's. ..	148	249	122	234	172	389
C. R. P's. ..	1121	2665	1062	2100	1510	3071

Excepting for C.M.A's., C.M.S.A's. and C.R.P's., the institution in 1914 has been relatively higher than in 1939; likewise the disposals generally. Though as an aftermath of the war of 1914 there was an increased output of litigation in the first instance this has been more than been counterbalanced by the subsequent fall consequent upon the economic conditions of the last decade. As regards arrears, their growth has to some extent been arrested and the figures at the end of 1939 do not show much variance from those at the end of 1914. As an explanation for the absence of more substantial reduction in the arrears in spite of the increased personnel of the Bench it has sometimes been suggested that the Judges of an earlier day showed deeper consideration and rendered more efficient work generally; it has also been pointed out at the other end, that the Judges have now more work to do by having to wade through too much law made by legislatures as well as by different superior Courts in the land, whereas the Judges formerly were guided mostly by fundamental principles merely. Be that as it may, one would wish that before making these periodical additions to the Bench the utility of such measures as the adoption of a larger number of working days and slightly longer working hours, delegation of purely routine matters to the Registrar and the Master on a larger scale, etc., should be tried. It is to be hoped that the appointment of the two additional Judges recently sanctioned will result in the accumulated arrears being cleared off within the next two years, particularly as fresh

institution is tending to go down, and that there will not arise any necessity for the strength to be permanently raised.

[CONTRIBUTED.]

BOOK REVIEWS.

PENOLOGY IN INDIA: Published by the Indian Publications, Ltd., Lalgir Chambers, Tamarind Lane, Fort, Bombay, 1940, 208 pages. Price Rs. 3.

This publication is a record of official proceedings, including the addresses delivered and papers read, of the First Indian Penal Reform Conference held in the Convocation Hall, Bombay, on 24th and 25th February, 1940, which led to the formation of the Indian Penal Reform League.

Penology is a subject intimately linked up with social welfare and its modern trends form a particularly fascinating subject of study. It is now largely recognised that crime is an anti-social act engendered and fostered by economic factors operating often on a person's latent vicious propensities which in the first instance are not always ineradicable by proper treatment. The causative factors in crime are many. Heredity, pathological conditions, poverty and passion do all in different degrees contribute to crime. There is a preventive, a punitive, as well as a curative aspect in the treatment of crime. Protection of society and rehabilitation of the prisoner should be the twin objectives of all penal reform. The normal misdemeanant and the hardened recidivist will have to be differently treated; likewise a proper discrimination has to be made between under-trials and convicts, and between juvenile delinquents and adult criminals. The present publication gives us a lot of useful information on various points interesting not only to those engaged in the study of penology but also to the lay public. The subjects covered include Criminal law and procedure, Modern penal movement, Prison practice, Juvenile problem, Psychology and crime, and Probation and criminal tribes. We have great pleasure in welcoming the publication which deserves to be widely read.

1941 REPORT OF THE COMMITTEE OF THE BOMBAY LEGAL AID SOCIETY for the year ending 31st December, 1940.

The Bombay Legal Aid Society whose objects are *inter alia* to give legal advice and legal assistance in negotiation and litigation to poor persons and to undertake cases, civil and criminal, so as to make justice accessible even to the meanest individual makes interesting reading and presents an imposing record of useful work done during the year 1940. As many as 98 appli-

cations for legal assistance were dealt with by the Society, besides giving advice in a number of cases embracing a wide area of justiciable matter. It is to be hoped that the splendid example set by the Bombay Society in this form of unselfish and useful work will inspire the starting of similar societies and institutions elsewhere all over India.

THE ARBITRATION ACT, 1940, by S. C. Das, M.A., LL.B., Advocate, Allahabad High Court and Editor, Allahabad Law Times. Published by the Allahabad Law Journal Press, 1941, 345 pages. Price Rs. 6.

The book is by one whose name is familiar to the legal world as the author of a number of useful publications. In the present work the text of the Indian Arbitration Act, 1940, with adequate commentaries has been provided. The case law, English and Indian, down to the end of 1940 has been noticed under appropriate headings in a helpful manner. A feature of the book adding to its utility is the incorporation of the texts of the relevant English Acts such as the Arbitration Acts of 1889, 1934, etc., as well as the provisions bearing on arbitration contained in Indian enactments like Act VIII of 1859, Act XV of 1882, etc., as an appendix. The introduction, giving a historical survey of the statutory provisions and the growth of the law of arbitration in India since the advent of the East India Company is another noteworthy feature. Too much brevity sometimes characterises the notes given under the sections making understanding somewhat difficult. On p. 50 it is stated that the authority of pleaders to refer in pending suits will be discussed in notes to S. 21. But there does not seem to be any direct reference to this point in the notes provided under that section.

The book is on the whole a useful addition to the literature on the topic of arbitration and is sure to be of great value to the members of the legal profession.

THE LAW OF EVIDENCE IN CRIMINAL CASES, by Sarat Chandra Chatterji, Advocate, High Court, Calcutta, 3rd Edition, by K.M. Ghosh, 1941. Published by Eastern Law House, Ltd., 15, College Square, Calcutta, 579 pages. Price Rs. 5.

The book is a commentary on the Indian Evidence Act intended specially to serve the requirements of the practitioners in the Criminal Courts. The amendments to the Act down to 1941 have been incorporated and in addition to the texts of the Indian Oaths Act, 1873 and the Bankers Books Evidence Act, 1891, the text of the Commercial Documents Evidence Act, 1939, has also been printed. The differences, wherever they exist, between English and Indian law have come in for appropriate notice.

The notes to the sections are reliable and exhaustive and are arranged under helpful headings. The citation of cases, English and Indian, is fairly full, though important decisions like *Ramanujam* v. *Emperor*, I.L.R. 58 Mad. 642 : 68 M.L.J. (Supp.) 73 (F.B.); *Attygalle* v. *Emperor*, 71 M.L.J. 321 (P.C.) and *Stephen Seneviratne* v. *The King*, A.I.R. 1936 P.C. 289 have not found inclusion.

The book is sure to be of great use to practitioners and we heartily welcome the publication.

Excess Profits Tax, by V. S. Sundaram. Published by Butterworth and Co., Ltd., 1941.

This book is intended to serve as a supplement to the Fifth Edition of the Law of Income-Tax in India by the same author and it is really in the light of this declared object that the incorporation into this work of about 100 pages of matter as Income-Tax Supplement has to be understood. The book gives the text of the Excess Profits Tax Act, XV of 1940, the rules framed thereunder, as well as commentaries on the sections. Though the tax imposed by the Act can be in its nature only temporary, still there are bound to arise in actual working a number of complicated problems, having regard to the highly technical character of the enactment. The elucidation of the sections so as to make them intelligible to the average man is no easy task. The author has sought to achieve this by a reference to the relevant decisions, Indian and English, given in cases relating to income-tax. Though the Excess Profits Tax is a development out of income-tax, still its ambit is not the same as that of the latter. Thus receipt in British India, *per se* will not attract the Excess Profits Tax as it attracts income-tax or super-tax. The notes to the sections are adequate and illuminating. The text of the Excess Profits Duty Act, 1919, and extracts from the United Kingdom Finance Acts, of 1915, 1916, 1917, 1918, 1919, 1926; 1937; 1938, 1939 and 1940, etc., are given as an appendix forming a noteworthy feature of the book.

The book is bound to be highly helpful to businessmen and lawyers alike and we have great pleasure in welcoming the publication.

THE DEBT CONCILIATION ACT: NEED FOR AMENDMENT.

The Madras Debt Conciliation Act has now been in force for nearly half a decade. Its working has brought to light a number of defects concerning both its policy as well as its provisions. Some of these are noticed in an article published elsewhere.[1]

As the nomenclature of the Act itself indicates conciliation and not coercion is to rule in relieving agriculturists from indebtedness. It is an "amicable settlement" that is to be promoted. Penalising the creditor is not within the scheme of the Act. To secure however the usefulness of the Debt Conciliation Board as an effective tribunal, there are certain special provisions. Of these S. 10 (2), which is the most dangerous from the creditor's standpoint authorises the Board to declare a debt due to a creditor "for all purposes and for all occasions to have been duly discharged", where without any justifying reason the creditor fails after being called upon to do so, to submit a statement of debts owed to him by the debtor in the manner prescribed by S. 10 (1). S. 11 imposes an obligation on the creditor submitting a statement under S. 10 (1) to furnish along with it full particulars relating to the debts and to produce at the same time all documents, accounts, etc., supporting his claim. Sub-S. (3) of S. 11 provides that if any documents or accounts in the possession or control of the creditor are not produced by him without valid reasons those documents shall not be admissible in evidence against the debtor in any suit by the creditor or by any one claiming under him for the recovery of the debt. Thus the only penalty attaching to wilful failure to produce the documents or accounts can be that prescribed in S. 11 (3) and there is hardly any warrant to apply S. 10 (2) in such cases and declare the debt due to the creditor to be discharged. It will be the duty of the Board in such cases to consider whether the debt in question is owing to the creditor and what is its precise amount, by having regard to the statement filed by the creditor, the admissions if any made by the debtor in his application or on oral examination and other similar evidence. The Board being however a tribunal which excepting for the chairman usually consists of members having no judicial experience, and the chairman himself being sometimes an essentially revenue officer like the Deputy Collector, there has often been a misapplication of S. 10 (2). To declare a debt due to a creditor as discharged, simply because he has not filed a statement confirming the particulars in the debtor's application, even where the debt due to him has been admitted, is a grossly arbitrary provision for which there is hardly any justification; to pass such an order against a creditor

1. *See* page 12.

after he has filed his statement within the appointed time, on the ground that he has not filed his accounts[1], or that he has challenged the jurisdiction of the Board in his statement[2], particularly where the debtor has not challenged either the debt or the amount due thereunder is altogether indefensible. It is very pertinent that in a recent case the High Court has been led to remark[3]:

"If administered in accordance with its spirit, the Debt Conciliation Act should, in spite of its defects, prove beneficial, but my experience gathered from the hearing of petitions for the quashing of orders of Debt Conciliation Boards, convinces me that the Act has not been administered by some Boards in the way it ought to be administered. I have noticed a tendency to use the powers conferred by S. 10 (2) of the Act arbitrarily and at times there has been flagrant misuse of the section. . . . . .

"Recalcitrant creditors are not deserving of sympathy, but it is difficult to see why a Debt Conciliation Board should be given the power to cancel a debt which the debtor himself admits to be due simply because a creditor has not filed a statement furnishing the particulars. . . . . .

"The cause for the maladministration of the Act in some cases may be that the members of the tribunals concerned have not the time to devote to the proper investigation of claims. The arbitrary nature of some of the orders, which I have seen, would suggest this. But if the legislative authority enacts a statute of this nature, it should make certain that there is proper machinery for working it. If there is no proper machinery, grave injustice is bound to follow."

These observations are weighty and cannot be ignored. It is therefore up to the Government to enact suitable amendments to the Act so as to ensure a proper machinery to work out its provisions and to abolish *inter alia* the penalty prescribed in S. 10.

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1. *Ramalingam Chettiar* v. *D.C.B., Dharmapuri*, (1941) 1 M.L.J. 108; *Venkataswami* v. *Maduliti*, (1941) 2 M.L.J. 155.

2. C. M. P. No. 4628 of 1940, 53 L.W. S. R. C. 5.

3. *See* judgment in C. M. P. No. 297 of 1941.

THE MADRAS DEBT CONCILIATION ACT (XI OF 1936): A SHORT STUDY.

BY

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It is a matter for regret that the Madras Debt Conciliation Act which so vitally affects a very large class of the litigant public has not attracted so far the attention that it deserves. This may, perhaps, be due to the fact that the Act, though passed in 1936, was originally applied only to a few select districts in the Province, and has been, only later, applied to larger areas.

The outstanding feature of the Act is the setting up of a new type of bureaucratic machinery under the style of Debt Conciliation Boards whose declared function is to "attempt to effect an amicable settlement" between the "agriculturist" debtor and his creditors. These Boards are to be under the immediate control of the Collector in the districts, and, under the overriding control of the Board of Revenue. The Boards are invested with a few judicial powers, but, in the field in which they are primarily intended to operate, they have not been given the power to settle the disputes by any binding decisions of their own. They are there, only to exert a moral pressure on the disputants, to coax them into sweet reasonableness if they can, and, thus, to induce the parties to come to an "amicable settlement" between themselves. Their functions are, thus, of an advisory nature; no sanction attaches to their decisions, in the sense that they can finally settle the disputes between the parties, by an overriding authority of their own. If the parties do not come to any agreement within one year of the initiation of proceedings (S. 17), or, if, at any earlier stage, the Boards consider that there is no use in attempting a settlement (S. 9), as, for instance, where the parties are intractable, the proceedings automatically terminate, leaving the parties in *status quo ante*. The parties are, on such termination, free to pursue the usual remedies available at law. But, so long as the proceedings are pending, there is a virtual suspension of the powers of the Civil Courts, in respect of matters pending before the Boards (Ss. 19 and 25).

The judicial powers of these Boards are categorised in a fasciculus of sections starting from S. 7 of the Act and culminating with S. 18. Special mention may be made of the following powers of the Board:—(*a*) the power to excuse delay on the part of a creditor in submitting a statement of his claim before the Board (S. 19); (*b*) the power to decide, where necessary, the "amount or the existence" of a debt [S. 11 (2)]; (*c*) the power to frame a schedule of assets and liabilities [S. 12 (3)]; (*d*) the power to decide, if an agreement come to between the debtor and the creditors is

"fair and equitable", and, if so, to direct the registration of such an agreement and, finally (S. 14); (*e*) the power to "certify" in proper cases that a creditor has "refused" a "fair" offer made by the debtor, and in consequence must suffer the disabilities mentioned in the Act (S. 18).

The rules framed under the Act provide mainly for a number of routine matters, such as the maintenance of Registers, and performance of a number of administrative duties.

The position of the Board in relation to the "Civil Court", an expression not defined in the Act, and to the Insolvency administration may be examined. The position as regards the Civil Courts is dealt with in Ss. 10 (3), 19 and 25. The broad effect of the two latter sections is to oust, almost completely, the jurisdiction of the Civil Court. The phrase "almost completely" is used, advisedly, because, it appears fairly clear that, although under the combined operation of these two sections, no new suits can be "entertained" (S. 19), nor old suits be "proceeded with" (S. 25), yet, so far as execution is concerned, the creditor can pursue his remedies at law, provided two negative conditions are satisfied, *viz.*, (*i*) he does not come within S. 18 (3) of the Act, and (*ii*) no execution proceeding is pending at the time when the Board's interference is invoked under S. 4 of the Act. To this narrow extent, then, is the jurisdiction of the Civil Court conserved; otherwise, its jurisdiction is entirely taken away in respect of "any matter pending before the Board".

Does the same position hold good in respect of the Insolvency Court, as well? It is submitted that the answer should be in the negative. The term "Civil Court" employed in S. 25 of the Act would not cover an Insolvency Court. It is well known that the Insolvency Court is a special statutory tribunal and cannot be considered as an ordinary Civil Court, in the ordinary significance of that term. Thus, it is said that, except under S. 4 of the Act V of 1920, the Insolvency Court may not decide questions of title. Conversely, the ordinary Civil Court may not decide questions falling within S. 53 or 54 of the same Act. It would follow, therefore, that there can be no question of the Insolvency Courts being affected, in any sense, by the pendency of proceedings before the Board. If this conclusion is right, there can be no difficulty in visualising the results of two different tribunals functioning in the same field, with varying powers and purposes. It is enough to say that confusion would result, with undesirable consequence to every one concerned.

These difficulties will not disappear, even if the conclusions were wrong and it were to be held that S. 25 hits at Insolvency Courts, as well. On that hypothesis, the matter would have to be considered in two different ways. First, the case may be taken, of

a debtor having been already adjudged insolvent[1]. In such a case, the debtor can have obviously nothing to gain by applying to the Board, except perhaps a certain amount of immunity from legal proceedings by his creditors. The property having vested in the receiver in insolvency, under S. 28 of the Act, no purpose whatever can be served by his entering into any agreement with the creditors. No property can be earmarked for the creditors, under S. 14, nor, can there be any use apart from the question of the legality, in the Board sanctioning such an agreement, under S. 18. Though the insolvency proceedings may have to be stayed—itself, a doubtful question, because, it is conceived, a receiver functioning under a Central enactment, cannot be made *functus officio,* by the operation of a Provincial one—still, there would be nothing left for any useful work to be done by the Board. The next case is where no insolvency proceedings have been initiated. In such cases, it is conceived that the Act will fully apply, and the field will be quite clear for the Board exercising its powers.

Apart, however, from this aspect, what is the purpose gained by creating a new machinery with powers somewhat analogous, but, not completely so, to those of the Insolvency agencies? The Act in question takes in, indeed, a few patches from the Insolvency law; thus, the power to frame a schedule of assets and liabilities is modelled on the power of the receiver in Insolvency to frame a schedule of creditors; and the power to substitute a more diligent creditor [S. 9 (*c*)] is modelled on S. 16 of Act V of 1920. Nothing, however, is gained by this sort of patchwork. If there were to be a complete adaptation of the Insolvency law—obviously, that has not been done, nor, would it be desirable—that will be inconsistent with the declared policy of the Act which is to "effect an amicable settlement", and *not* to effect an equitable distribution of the assets of the debtor amongst his creditor. Either way, therefore, this Act is not needed.

Is any advantage of a permanent character derivable at all from the Act? Has the declared object of the Act been in any way advanced? Can the Boards render any effective service? All these questions can result only in a negative answer.

The debtor may get some respite from his creditors, but, when the proceedings before the Board come to a close, infructuously, as they must, in a preponderatingly large majority of cases, the debtor will have to repay to the creditor all the latter's dues, of which, he had been kept out, by force of the law. It is true, indeed, that, during the pendency of the proceedings under the Act, the

1. If a debtor has been adjudicated insolvent, neither the debtor nor the creditor can apply under the D. C. Act for any relief, as insolvency takes away the jurisdiction of the Board, see *Venkayya* v. *Sambayya,* (1938) 2 M.L.J. 93 and *Dasaradharama Reddy* v. *Rahimtulla Hussani,* (1940) 1 M.L.J. 270. *Ed.*

debtor would be entitled to continue in possession of his properties and to enjoy the income. But, the gain under this head is illusory. The creditor's claim remains unaffected, and, fortunately for him, is kept intact, being saved from the operation of the law of limitation, by virtue of S. 27 of the Act. The creditor, of course, is, for the moment, kept out of his claim; but, he remains, otherwise, unaffected. The only effect on him would be to create in his mind a lingering rancour against the law.

As for the Board, it is difficult to imagine a more futile body appointed to transact public business. The Board is charged with the duty of "effecting an amicable settlement", a term not defined in the Act, between the "agriculturist" debtor and his creditors and, thereby, to "relieve" him from his "indebtedness". S. 18 (1) of the Act furnishes a clue as to the meaning of the term "amicable settlement"; the creditor is expected to forego a portion of his claim, in order to save the debtor. It is against human experience, however, to expect the creditor to agree. No one will give up his claims willingly, however laudable it may be morally so to do. The Boards have not been invested with any power to bind parties by their decisions. They might have been given the power to take stock of the whole situation and to effect an equitable distribution of the debtor's assets in a manner which while satisfying the creditors to some extent would, at the same time, leave something for the debtor. But, for accomplishing such an object, no amount of moral pressure could help. And it would have been against the scheme of the Act to invest the Board with any powers of compulsion, even in the manner in which ordinary arbitral tribunals are clothed with by the law. The Board is, thus, left in the sorry position of attempting, as best as it can, and by exercise of moral pressure, to accomplish the admirable purpose of the Act, within a period of one year, (S. 17), and, if unfortunately nothing can be done, it has to throw up its hands.

The whole legislation would thus prove incapable of achieving anything substantial. If the "agriculturist" had to be saved, more drastic legislation was surely needed. This was, in fact, furnished in the form of Madras Act IV of 1938, the Statement of Objects and Reasons of which announced, in its opening sentence, that "conciliation had failed" and that new legislation was required. Why, then, was the Act XI of 1936 not merely retained but, on the contrary, extended in its application? There is no justification for keeping in force an enactment which creates merely new anomalies. It behoves the Government not to offer any fillip to such tendencies, especially, at a time, when there are signs, of failing reverence for the law. It is hoped that the Government would have the whole position reviewed and either repeal the Act or have such changes introduced as would make the measure less objectionable and more useful.

PRISON REFORM

BY

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I—Introductory.

Back-ground: Prison reform depends among other things upon (*a*) Conception of crime. (*b*) Conception of punishment. (*c*) Conception of prison.

Causes: Prison reform is now an urgent necessity in all progressive countries because it is demanded by the following causes:

A—Theoretical. (1) *The New Enlightenment and Humanism*, urging humaner treatment. (2) *The New Education*, which prefers liberty to compulsion, abhors corporal punishment, conceives discipline as self-discipline based upon the voluntary self-control of the party, and believes that none is incorrigible and incapable of reform. (3) *Progress of Science*, especially of Anthropology, Sociology, Criminology and Psychology which have revolutionised the conceptions of criminal responsibility and anti-sociality and penal treatment. (4) *Democratic conception of Constitutional Justice*: The problem of justification of the State using force against free citizens has now become acuter than ever on account of the control of the State often by vested interests, and the abuse of the State's power by resort to frequent wars and repression and by failure to prevent the exploitation of the many by the few. Democracy now wants to control and limit the right of the State to use force against its citizens by calling them criminals. (5) *Rise of Revolutionary "Crime"*: Large sections of enlightened modern opinion want a reconstruction of the State in a form which will not be liable to be controlled and exploited by selfish indivials, vested interests, and irreconcilable party cliques. This could only be achieved according to them by revolution and not by constitutionalism. The revolutionaries want to use crime as a weapon of war against the State in its present form and are advocating on philosophical, ethical, and scientific grounds the most violent forms of crime such as anarchist outrages, nihilist assassinations, syndicalist sabotage, and armed insurrection. Crime thus becomes exalted and blessed, the refuge of the morally enlightened instead of the morally debased. The right of the State to oppose this revolutionary crime is now under trial.

B—Practical. (6) *Normal need for reform*, of every institution periodically. (7) *Failure and inefficiency of the old system of prisons*: (*a*) There is no evidence of any

deterrence of crime resulting from prisons either by reduction in the number of criminals or in checking criminality in the community. (*b*) Nor is there evidence of any reformation in the character and habits of the prisoners. (*c*) Positive harm and danger to society results from prisons which really breed criminals, produce recidivists and habituals, destroy personality (by killing self-respect and moral sustaining power), practically ban all decent means of livelihood and make crime the sole means of living, create a beastly class among men, and produce insanity, suicide and drunkenness. (8) *Prohibitive costliness of modern civilised prison system*:—(*a*) Even under the old system each prisoner in England cost about £ 150 per year[1] and £ 5,000 for each reprieved murderer including trial expenses for counsel, expert witnesses, and so on[2]; (*b*) If according to modern requirements separate prisons or wards are to be built for juveniles, adolescents, women, habituals, under-trials, and so on, and if they are to be thoroughly equipped with laboratories, industrial plant, and a corps of experts, the cost of the prison administration would become almost unbearable. (9) *Multiplication of crimes and criminals*:—(*a*) There is a steady growth in the number of criminals due to economic depression and unemployment, irreconcilable political warfare, social dislocation, growth of population, wars, and so on. (*b*) There is also a growth in the number and variety of crimes due to increasing complexity and richness of modern life. Modern traffic, electricity, radio, cinema and aeroplane have each given rise to new offences. (10) *Imprisonment as the residuary punishment*: Imprisonment as a regular form of punishment dates from the eighteenth century in Europe. In recent times old forms of punishment are disappearing and imprisonment is replacing them. Convicts reprieved for murder, those unable to pay fines or furnish security or undergo corporal punishment or who cannot be transported are all sent to prison. Imprisonment has thus become the residuary punishment for the ever growing legion of offences in modern times.

Aims: Prison reform has as its aims:—

(*A*) Reduction of cost which necessitates: (1) Greater efficiency and large scale organisation. (2) Reduction of the number of prisoners. (3) Reduction of the duration of prison life. (4) Economic self-sufficiency of prisons. (5) Development of alternative punishments. (6) Non-officialisation of prison administration.

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1. H. U. Triston, Men in Cages, 1938, p. 228.
2. *Ibid.*, p. 231.

(*B*) Reforms based on the new ideas of criminology. (*C*) Reforms based on the new ideas of penology and (*D*) Reforms based on the new ideas of prisonology.

II—Criminological Problems.

Under this head will have to be considered:

(1) New conception of crime with reference to (*i*) Normality; (*ii*) Anti-Sociality; (*iii*) Fixity; (*iv*) Secularity; and (*v*) Personality. (2) New conception of criminal responsibility. (3) The New Treatment. (4) Etiology. (5) Classification, and (6) Prophylaxis.

(1) *New Conception of Crime.*

(*i*) *Normality of crime*: (1) The popular view of the criminal being an abnormal, horrible, loathsome, dangerous beast has been fed by the abnormal dress and treatment accorded to offenders in Courts and prisons. (2) Modern criminology and psychology suggest that a large part of criminality is the result of some atavistic and pathological abnormality. (3) Barring this, the criminal is a perfectly normal creature, and deliberate crime seems essentially a normal activity of normal persons for satisfaction of normal needs. All men are selfish in differing degrees and work for self-gratification and exploit others for that end. Many moralists maintain that all successful careerists, businessmen, and politicians are with few exceptions unpunished criminals. (4) If man is by nature sinful or wicked, crime would be merely the assertion of this original nature and the loss of the acquired quality of goodness. (5) Revolutionary thought brands the cry against crime as the cry of exploiters and vested interests against the threat of danger to their exploitation and ill-gotten gains. Socialism considers that property is the result of theft and hence its re-theft by the needy would be a blessing. (6) Sociologists like Durkhiem find positive merit in crime in that it keeps society alert and active, and indicates the need for and direction of reform.

(*ii*) *Conception of Anti-Sociality.* (1) Crime is an act or omission which the State punishes as being in its opinion anti-social. The dogmatic fervour with which people are apt to be unthinkingly and unfeelingly crying for punishment of criminals would be justified only if the State's opinion holding any particular thing as anti-social is infallible, immutable, universal, and eternal truth. (2) But history proves that such opinion varies from age to age, country to country, and people to people. Many primitive races of to-day as well as the ancestors of many civilised races in the past have held that cannibalism, incest etc.,

were sacred duties. Conventional morals about married or family life have been weakened by the American phenomena of companionate marriage, universal use of birth-control, free divorce, and by the Bolshevik abolition of marriage and illegitimacy and family life. At Samara in the U. S. S. R., it is recorded that a daughter had two children by her father but the Supreme Court refused to regard the union as criminal and refused sanction for prosecution[1]. Bolshevism has also abolished blasphemy. Every rule of orthodox morality and opinion is now hotly questioned, and violent differences of opinion have arisen about each and all. Modern tendency is clearly opposed to the State selecting one of these opinions and coercing all other opinions. (3) The prevailing political atmosphere very largely determines the opinion of the State about anti-sociality. When irreconcilable religious (*e.g.*, Hindu-Muslim), racial, (*e.g.*, Teuton and Slav in old Austria-Hungary) or political (*e.g.*, Nazi and anti-Nazi) groups wage civil war within a State, mutual assault, hurt, arson, kidnapping, murder, sabotage and sacrilege often come to be regarded as a duty for each party. (4) Modern revolutionary thought is found advocating crime itself as a weapon against the State.

(*iii*) *Fixed criminal types*: (1) As crime is relative to changing opinion and circumstances there can be no such thing as a fixed objective criminal type existing. No man and no act could ever be branded as being always and wholly anti-social. (2) A fixed subjective criminal type is also psychologically impossible. There are no such things as fixed criminal instincts, criminal faculties or criminal emotions. Even an atavist becomes a criminal only if circumstances favour. (3) The idea of a criminal class is itself fallacious. Murderers, robbers, heretics, sex offenders, swindlers, as well as those who drive a cart on the wrong-side, use false measures, build without licence or commit nuisance are all criminals but such a heterogeneous group can never constitute a social class. (4) The same must apply to the idea of a criminal tribe. A tribe is a primitive form of a nation consisting of countless types of individuals. No nation, race, tribe, or country could properly be conceived to be wholly or predominantly criminal. In India a differential treatment is being meted out to many primitive tribes under special penal laws. It is ultimately the civilised man who everywhere drives out these peoples out of their old moorings, and when he finds that they cannot serve him and toil for him he conceives a prejudice against them and calls them dangerous criminals. The reclamation he holds out to them is to

1. Waldemar Gurian, Bolshevism, 1932, pp, 358-9,

evolve them into submissive and useful servants of society. If these peoples are viewed to be akin to children and handled with sympathy and patience and are given adequate economic help they would at once become as upright and happy as others. This economic help in the beginning may be predominantly in the form of doles. When several countries are spending enormous sums as doles even to skilled artizans when unemployed, can we not extend the same to peoples who are quite unable to stand on their own legs in an economic sense?

(*iv*) *Secularity of Crime*: (1) Crime, sin and vice fundamentally differ in their nature, source of origin, province, effect and sanction. Crime is a creature of law. Law is secular or materialistic in the Marxian sense and is the product of the material conditions prevailing at any time. But still the habit of regarding crime both as a sin and a vice persists as a result of which the punishment and treatment to be accorded to a criminal is sought to be determined not on material or secular grounds only but also on moral and religious grounds. (2) Religious people regard crime as a sin produced by the Devil, evil spirits, the Gods, past Karma, Fate, Providence, original evil nature, or evil association. They prescribe punishment as an expiation. The theory of solitary confinement and the rule of silence owe their origin to the Evangelicals who wanted the criminal to be redeemed by silent solitary meditation and repentance. The Avadanas of Asoka allege that he had erected an earthly hell to inflict all the tortures of hell on convicts. (3) Moralists are largely responsible for the atmosphere of horror surrounding criminals and for the harsh treatment meted out to them. A crime judged on moral grounds to be heinous or wicked or involving moral turpitude is being doubly punished. (4) The vested interests in a State naturally benefit from the help afforded by religion and morality in dealing with crime. They justifiy its repression on the plea that it is putting down sin and vice. They doubly punish political crime by declaring that it involves moral turpitude. They call upon the religious authorities to punish such criminals by religious methods also. (5) This intrusion of religion and morality into the realm of secular crime has absolutely no theoretical justification. Both philosophy and science as well as history justify a contrary conclusion. On practical grounds such intrusion does immense harm to religion and morality as well as to secular welfare. (6) Modern science is fast exploding the religious view of crime and punishment, and thereby seriously discredits religion itself. It would thus not be in the interest of religion to invoke the religious view of crime. If it condemns political crime it would

be taking sides. If it condemns economic crime it might become the tool of exploiters. If it condemns crimes of passion it would run counter to modern psychology. If it condemns petty technical offences as sinful it would make itself oppressive. (7) Morality would also get itself tarnished and discredited by seeking to punish crime on moral grounds in the secular field. Morality would then tend to support the doctrine that reasons of State are morally valid. (8) It is therefore desirable that the secular authorities should be prohibited from importing considerations of religion or morality in dealing with crime.

(*v*) *Crime and the criminal*: (1) In modern criminology the subjective view receives greater attention than the objective view of crime. It holds that the criminal and his motives are far more important than the act and results of crime, although it is the crime that makes the criminal and not the criminal the crime (as then if the latter were true there would exist an inborn criminal and crime would be merely his activity). (2) The objective view implies impersonality and punishment based on injury done. All modern penal systems profess to punish crime impersonally—irrespective of the personality of the doer, of his status or motive or condition. No crime can go unpunished. Crime which causes injury to society must be punished by way of retribution or deterrence whoever might be the doer—a child or a lunatic or a sickly man, and whatever might be the circumstances under which it is committed, by ignorance or accident or coercion. Even the father of modern penology, Beccaria, held that crime must be punished according to injury and not intention. (3) But it is the individual who is punished and who suffers and who is to be deterred. He is a normal person like others. Why does he then act so as to injure others? The key to this lies in the discovery of his motives for doing that act. These motives depend upon his psychology (hereditary as well as acquired) and his environment. The professed aim of punishment is to induce the man to control his motives, his psychology, and his environment, so as not to cause any injury to others. But a man's control over his motives, his psychology, and his environment is very limited. The recognition of such a limitation produces a two-fold result. If we are to punish a crime at all we will have to determine how far its doer is responsible as master of his motives, psychology and enviornment and how far these have made him their victim in producing that crime. Since punishment can influence the doer only to the extent to which he can master his motives it is necessary to devise fresh methods of preventing crime other than punishment. Both these problems—the problem of criminal responsibility and the problem of treatment of the criminal—require a

study of the nature and working of all those motives and the psychology and the environment of the criminal. An abstract and objective study of crime although necessary will not form the dominant subject of criminology. Personality is now recognised as lying at the core of criminality. (4) According to this new view the treatment must be not for crime but for the criminal. The treatment must fit the criminal and not the crime. It will have to be individualised and follow the methods of discipline advocated by the New Education. Punishment will dwindle into insignificance and will have to change its character and call itself reformatory treatment or social defence.

(2) *New Conception of Criminal Responsibility.*

(*i*) If a person is to be held responsible for an act of crime, freedom to do it or to avoid it on his part is postulated. He must will and intend the act freely. Criminal responsibility for crime exists only if there is *mens rea* as the English law states or if there is free-will as other systems declare. (2) Freedom means self-mastery. There will be no freedom or responsibility if the man cannot control his motives, his psycholgoy and his environment and if his will acts in ignorance or without free consent (under mistake, misrepresentation, fraud, undue influence, coercion, mental defect). Modern criminology under the influence of Lombroso, Freud and others holds to the theory of Determinism. It considers that mental defects or environmental defects practically dominate the whole life of man and determine all his criminality. This theory of Determinism has relegated to the background the idea of punishable criminal responsibility and makes penal law the law of tutelage of deficient beings. (3) But all the existing penal systems claim to be based upon the theory of free choice. They do not recognise that crime is predetermined but profess that man is largely free to commit or resist crime. (4) But the tragedy of the situation is that these penal systems not merely fail to take note of the fact that mental and environmental defects revealed by modern research almost wholly produce criminality but assume without any effort at proof the existence of free intention and free will in all persons on the basis of a series of fictitious presumptions. Except practical convenience there is no justification or validity for any of these presumptions which are wholly false. (5) These presumptions are three-fold: (*a*) Presumptions of knowledge. Law assumes that everyone has a knowledge of law and also a knowledge of all the consequences of his acts. (*b*) Presumptions of Intention. Law presumes intention from knowledge or from the natural consequences of an act. The will may know an act to be wrong but may

be too weak to resist the doing of it or be forced to do it without intending to do so. An intention to do an act cannot be presumed from mere knowledge. The old theological doctrine that a man must be presumed to intend the natural consequences of his acts utterly breaks down under modern psychological research. (*c*) Presumption of free will. Law assumes every one to be a free agent. This is not true. Free will is not freedom. The will may be free to think or feel in one way but be unable to carry it out. Freedom of will in thought, feeling and action may not always coincide. What is free will? Mediæval theologians argued that a motiveless act is the act of free will. A motiveless man can only be found in a lunatic asylum. No crime could be motiveless. If so it cannot be the act of free will and cannot be punished at all.

(3) *The New Treatment of Crime.*

(*i*) *Failure of penal treatment.* (*a*) Since the province of criminal responsibility under the new theory of Determinism has shrunk into utter insignificance the province of punishment has also disappeared. (*b*) Even the name of punishment has given place to the word, Social Defence. Punishment also is changing its character by becoming reformatory. (*c*) The basis of punishment is fear. It is the fear of danger to vested interests that makes them resort to punishment. They want to rule by fear, by producing fear in the people by means of punishment. (*d*) The true basis of discipline is self-control. A parent, a teacher and a ruler have all to create and maintain discipline. Discipline means control. Control by external force and fear proves both ineffective and harmful. It crushes out personality and will power, deadens the soul, destroys self-respect and moral effort, breeds resistance and desire for revenge, and creates hatred to the object aimed at. Discipline by fear is a labour-saving device; discipline by freedom as under the Montessori system would involve infinite patience and pains at guiding the child to learn self-control. Self-control is based on freedom. Work done for its own sake without regard to other purposes is free. Restraint by fear of punishment is not self-control because the man is bowing to the inevitable and does not feel the need of self-control. Such punishment will not be reformatory and will not make the man give up crime by inner conviction and self choice. (*e*) Punishment to the extent it is retained will have to be according to the degrees of culpability which are to be measured on the basis of the motives and environmental conditions determining the criminal act. (*f*) Crime evokes hatred but punishment would evoke pity thereby proving that punishment is not the proper treatment for crime.

(*ii*) *Subjective treatment.* (*a*) It is now recognised that the treatment must be for the individual and not for crime. It will take note of his motives, mental traits and conditions of life. (*b*) The doctrine of punishment fitting the crime (to be examined later) is no longer tenable. Punishment must fit the criminal for reforming his character.

(*iii*) *Individualisation of treatment.* The new treatment will deal with each individual criminal according to his needs. It will not be one uniform method for all but will admit of infinite variation. Mere fear of discipline will not admit of individualisation.

(*iv*) *Methods of treatment.* These are (*a*) Penological—infliction of punishment. (*b*) Reformatory—aiming at reforming the character of the criminal, making him a better man and a better citizen, teaching him a useful trade or vocation, improving his education, inculcating self-control and self-respect, and making it impossible for him to return to crime. (*c*) Psychopathic and Sociological—aiming at curing the mental defects and reforming the environmental conditions and at treating the criminal as a patient or a child.

(4) *Etiology of Crime.* (*a*) The causes of crime can only be investigated after settling the nature of crime.' Crime proceeds from a complex set of motives for self gratification. The causes producing criminality are psychological, organic, racial, physical, social, economic, political, religious and ideological. Of these the psychological, organic and economic causes admit of far-reaching research and study in modern times. (*b*) The Italian School of Criminology led by Lombroso emphasised Heredity as a factor in crime. Biological atavism was held to be the basis of all the atrocious crimes. Such criminals could only be treated as patients. This school has enabled us to discover that a good deal of crime is due to some kind of mental defect hitherto undetected or unnoticed or unknown. Freudian Psychology has emphasised the same conclusion. (*c*) The French Environmental School of Criminology traces crime predominantly to defective environment. It was accepted by all believers in progress by education and transformation of the envoirnment. Socialists who hold that crime is the result of the exploitation of vested interests also support this view.

(5) *Classification of crimes and criminals.*

(A) *Classification of crimes.* (*i*) It is necessary to distinguish murder from a foot-path offence. (*ii*) The classifications of crimes suggested by thinkers and Penal Codes are countless in number. (*iii*) The Indian Penal Code classification of offences into cognisable, compoundable, summarily triable and so on is

unscientific and irrational. (*iv*) The English classification into treason, felony and misdemeanour is not happy. The German classification into offence, misdeed and delinquency is better. But the French classification into crimes, misdemeanours, and contraventions is about the best and may be adopted. (*v*) Classification of crime based upon motive takes us into the classification of criminals. (*vi*) Gandhiji's classification of crime into crime with or without violence is simple in appearance but very complicated in its interpretation. To Gandhiji, violence would be both physical and moral violence. Some of his followers hold that political offences do not admit of any moral violence and should not be punished if no physical violence is involved. Moral violence is a metaphysical abstraction and cannot serve as the basis of a scientific classification. (*vii*) Nevertheless the classification based upon motive and physical violence would be about the best that we can have for the penal regulation of crime. (*viii*) Political crime is to be distinguished from other crimes from its being committed from political motives. Political crime in India consists of waging war, sedition, political assassination, political dacoity and arson, civil disobedience (which includes violation of orders under Ss. 107, 108 and 144, Criminal Procedure Code, and Police Regulation), press offences, revolutionary crime, labour agitation offences, and perhaps Military offences.

(*B*) *Classification of criminals.* (*i*) The numerous classifications of criminals as congenital, instinctive, circumstantial, passional, recidivist, professional, habitual, incorrigible and so on are of great practical significance. (*ii*) Classification according to degrees of culpability: (1) Real criminals. Those who can be held to be really responsible for the crime committed by modern criminological standards—(*a*) True criminals. Those who are guilty of both criminality and crime. (*b*) Pseudo-criminals. Those who are guilty of crime without criminality such as chance criminals or juvenile criminals. (2) Nominal criminals. Those who commit crime as victims of some mental or environmental defect and are nominally culpable. (*iii*) The three methods of the new treatment of criminals are organically connected with this classification of criminals. The Psychopathic treatment applies primarily to Nominal criminals. The Penal treatment ought to be confined to the True criminals only and by way of reformation.

(6) *Prophylaxis.*

(*i*) None will deny that prevention of crime is better than its cure. (*ii*) Some of the means of prevention are: (*a*) General education of the people. (*b*) Economic improvement; eradication

of poverty and unemployment. (*c*) Improvement of the environment. (*d*) Growth of tolerance and good will. (*e*) Moral education. (*f*) Growth of respect for law: Democratisation of the State and society. (*g*) Medical and psychical treatment of suspects and offenders. (*h*) Social reform. (*i*) Labour welfare. (*j*) Police prevention.

SUMMARY OF ENGLISH CASES.

BATTING *v.* LONDON PASSENGER TRANSPORT BOARD, (1941) 1 All.E.R. 228 (C.A.).

Limitation—Period of limitation extended by later Act after expiration of the period under earlier Act—Amendment of statement to claim making out a new cause of action—Not to be allowed.

On 11th December, 1939, the plaintiff was involved in an accident in which she was injured by a tramcar belonging to the defendants—a public authority. The period of 6 months under the Public Authorities Protection Act then in force within which an action had to be commenced expired on 11th June, 1940. The writ was issued on 11th April, 1940, claiming damages for negligence without specifying the particular type of negligence of which the defendants were alleged to have been guilty. On 28th May, 1940, a statement was put in making it clear that the complaint against the defendants was one of negligent driving by the tramcar driver. On 1st November, 1940, an application for leave to deliver an amended statement of claim was made. The amendment sought to set up a new and different case that defendants were negligent in maintaining the roadway.

Held, that the amendment set up an entirely new cause of action and was barred under the Act as it stood. The introduction of a longer period of one year's limitation by an amendment to the statute, which came into operation 19 days after the limitation of 6 months under the provisions of the unamended Act had expired cannot be of any avail as the cause of action was already completely barred.

MURFIN *v.* ASHBRIDGE & MARTIN, (1941) 1 All.E.R. 231 (C.A.).

Practice—Insurance company given control of proceedings by or against insured—Insurers—No locus standi *in actions to appeal in own name.*

Though insurers had been given by the policy, control of the proceedings and could take any step in those proceedings in the

name of the defendant, yet they are not parties to the action and no application or appeal could be made in their own name.

Re., WEBB, BARCLAYS BANK, LTD. *v.* WEBB AND OTHERS, (1941) 1 All.E.R. 321 (Ch. D.).

Insurance—Life insurance—Parent effecting policies in name of his children—Death of parent leaving will—Person entitled to the policies.

During his lifetime the testator took out two insurance policies on the respective lives of his two children. All the premiums on the policies were paid by the testator down to the time of his death and on the death of the testator the question arose as to whether the money payable under the policies would form part of the testator's estate or whether the child named in each of the policies was entitled to the money assured. In the proposal form the father was described as the grantee who was desirous of effecting an assurance on the life, on behalf and for the benefit of the person therein named as "the life assured", namely, the child.

Held, that the life assured was the person entitled to the money payable under the policy and if there were any further payments to be made the person whose life was assured was the person to make those payments. On the wording of the policy there was sufficient to establish a trust in favour of the children as against the father who no doubt effected the policy.

(1924) 2 Ch. 348 and (1938) Ch. 799, distinguished.

Re., GALE, GALE *v.* GALE AND ANOTHER, (1941) 1 All.E.R. 329 (Ch. D.).

Will—Bequest—Gift during widowhood—Beneficiary remaining spinster—Effect on gift.

The testator who had a wife had also co-habited with another woman *D. M. L.* In his will he directed his trustees to allow *D. M. L.* to enjoy "during her widowhood" a certain dwelling house and also to pay her 25s. per week for a period of twelve years. *D. M. L.* though she had children by the testator was never married to him. On a construction of the will,

Held, that the gifts failed as the period for which provision was made could never exist.

Re., MYLINE, POTTER *v.* DOW, (1941) 1 All.E.R. 405 (Ch. D.).

Will—Religious trust for benefit of missionaries holding certain beliefs—Validity.

A trust was created for the benefit of missionaries by will and a clause in the will provided that "no person shall be eligible for any benefit under the trust unless he or she shall be a Protestant in religion and a whole-hearted believer in the divinity of Christ and the full inspiration of scripture."

Held, that the clause differed from a forfeiture clause and as it was possible for the trustees by inquiries to ascertain whether a particular person was suitable the condition was not impossible to fulfil and the gift was not void for uncertainty.

(1940) Ch. 385=(1940) 1 All. E.R. 632, Dist..

Re., GREAT EASTERN ELECTRIC Co., (1941) 1 All.E.R. 409 (Ch. D.).

Companies—Voluntary winding up—Debts incurred before and after—Priorities.

A liquidator in a voluntary winding up may without any sanction carry on the business of the company so far as it may be necessary for the beneficial winding up thereof. If, in the proper exercise of this statutory power, he incurs obligations, those to whom he incurs them are entitled to be paid out of the assets of the company in priority to its creditors at the commencement of the winding up. There can be no question of the two classes of creditors ranking *pari passu*. If the condition is fulfilled the post-liquidation creditors come first. If it is not they do not come in at all, or at any rate not until the pre-liquidation creditors have been satisfied.

FREDENSEN *v.* ROTHSCHILD, (1941) 1 All.E.R. 430 (Ch. D.).

Deed—Rectification—Evidence of mistake—Burden.

A person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution and further he must be able to show exactly and precisely the form to which the deed ought to be brought. For there is a material difference between setting aside an instrument and rectifying it on the ground of mistake. In the latter case mutual and concurrent intention of parties must be established.

DUNCAN *v.* CAMMELL LAIRD & Co., (1941) 1 All.E.R. 437 (C.A.).

Practice—Discovery—Production contrary to public interest—Privilege.

Where the head of a department of State claims privilege for production of documents, the Court must give effect to that claim.

HORN *v.* SUNDERLAND CORPORATION, (1941) 1 All.E.R. 480 (C.A.).

Land Acquisition—Compensation—Disturbance of business—Compensation for—Right to.

Under the Acquisition of Land (Assessment of Compensation) Act the person whose business premises are compulsorily acquired is entitled to compensation but since the value of the land as building land could only be realised by the removal of the business, compensation for disturbance of business could not be awarded because the value of the land as building land exceeded its value as agricultural land plus the value of the minerals plus the loss by disturbance. If the sum of these exceeded the value as building land then the owner would be entitled to the difference. (1941) 1 All. E.R. 166, reversed in part.

MICHEL HABIB *v.* SHEIKH SULEIMAN, (1941) 1 All. E.R. 507 (P.C.).

Contract—Agreement to pay on breach a certain amount as liquidated damages—Damages or penalty—Test for enforceability.

Agreed liquidated damages if to be enforced must be the result of a "genuine pre-estimate of damages." They do not include a sum fixed *in terrorem* covering breach of contracts of many varying degrees of importance the possible damages from which bear no relation to the fixed sum, and which obviously have at no time been estimated by the contracting parties. When the sum agreed is a penalty, whatever it may be called in the agreement, then the penal stipulation will not be enforced.

CORBETT *v.* DUFF, (1941) 1 All. E.R. 512 (K.B.D.).

Income-tax—Professional football player—Receipt of proceeds of benefit match—Taxability.

If a payment to the assessee though voluntary is remuneration for an office or employment, it is taxable, but, if it is personal in the sense that it is given to the person not as a holder of an office or employment but as a personal testimonial, it is not. The line is often difficult to draw.

Where in the case of a professional foot-ball player taking part in a benefit match, payments though not obligatory, are expected, are generally asked for, and are usually accorded, the payment must be treated as remuneration for employment as a foot-ball player.

GOULD *v.* MCAULIFFE, (1941) 1 All. E.R. 515 (K.B.D.).

Tort—Dog known to be dangerous—Injury by—Liability of owner.

A licensee of a public house who has a dangerous dog, ought to take steps to see that that dangerous dog is kept away from customers of his inn behaving reasonably and without negligence. The owner of the animal ought to see that it is so secure that it cannot attack any one who is on his premises or who mistakenly steps one or two yards through an open gate therein. Where through the owner's failure of such duty the plaintiff is injured by the dog, the owner is liable.

HASELDINE *v.* DAW & SON, LTD., (1941) 1 All.E.R. 525 (K.B.D.).

Landlord—Defective condition of lift—Liability to visitor of tenants—Liability of repairer to users of the lift.

The plaintiff, the managing clerk to a firm of solicitors, in the course of his professional affairs went to a block of flats, owned by *X* and managed by *Y* and Co., in order to call upon a tenant living there. Owing to the defective condition of the hydraulic lift he sustained severe injuries and brought an action for damages against *X* the owner, *Y* & Co., the managers and *Z* the lift engineers who were responsible for "inspecting the lift every calendar month during working hours to adjust, clean and lubricate the mechanism, to provide the cleaning materials and necessary lubricants and to attend also at all reasonable working hours to adjust the mechanism in case of stoppage or irregular running between the periodical visits." The day before the accident the lift engineers had attended and adjusted the mechanism.

Held, that the plaintiff was not an invitee for the purposes of the occupier. He was only permitted to use the lift for his own purposes to call on a tenant and so was a licensee and the only duty of *X* was to warn him of any danger of which he had actual knowledge.

(2) In undertaking the carriage of the plaintiff in the lift, *X* was under a duty to use reasonable care to provide a vehicle reasonably safe for the conveyance of the plaintiff, as well as to exercise reasonable care in the conduct of that vehicle throughout the course of the journey.

(3) The complete maintenance of the lift not having been entrusted to the independent contractors *X* had not discharged his duty to see that the lift was reasonably safe and *X* was accordingly liable.

(4) As regards the lift engineers they were also liable to the users of the lift because the accident was due to their failure through their workmen to do their contractual work with reasonable skill and care.

KENT *v.* EAST SUFFOLK CATCHMENT BOARD, (1941) 1 All. E. R. 527 (H.L.).

Tort—Sea wall—Repair by statutory authority—Negligence in—Damage to plaintiff's land due to inundation of salt water—Liability.

As the result of the defendants' negligence in the exercise of their powers to repair (failure to properly repair a sea wall which had collapsed) the plaintiff's pasture land was inundated by salt water. In a claim for damages,

Held (reversing the majority view of the Court of Appeal, Lord Atkin dissenting), that a Catchment Board which is under no statutory duty to landowners within its area is never liable to one of them either for total neglect to exercise its statutory powers or (if no more is proved) for exercising them with lack of efficiency or with too little zeal or dispatch.

Re., SAMUEL: JACOBS *v.* RAMSDEN, (1941) 1 All.E.R. 539 (K.B.D.).

Will—Condition for forfeiture of legacy on "Marriage with a person who is not of Jewish parentage and Jewish faith"—Validity of condition.

A condition in a will for forfeiture of legacy in the case of the marriage of the testator's daughter to a person not of the Jewish faith is void for uncertainty.

(1940) 1 Ch. 385, followed though doubted.

Re., DESTONE FABRICS, LTD., (1941) 1 All. E.R. 545 (Ch. D.).

Companies—Company in insolvent circumstances—Issue of debentures creating floating charges—Arrangement not bona fide *for benefit of company—Validity—Tests.*

Where debentures are issued by a company in insolvent circumstances within six months before its winding up, the test for deciding the validity of such issue is whether the transaction is to be regarded as one intended *bona fide* for the benefit of the company or as one for the benefit of certain creditors of the company.

Where the effect of the issue of the debentures is to procure the payment to certain of the directors in preference to other

creditors of the company of the sums due to them the floating charge created by the debentures is wholly invalid.

NEWELL *v.* GILLINGHAM CORPORATION, (1941) 1 All. E.R. 552 (K.B.D.).

Master and Servant—Apprentice—Dismissal of, for turning "conscientious objector"—Liability of master for breach of covenant.

A clause in an apprenticeship deed provided "should the apprentice be wilfully disobedient or be slothful or negligent or otherwise grossly misbehave himself the master may discharge the apprentice from service."

The apprentice became a conscientious objector and as a result the master discharged him. An action was commenced to recover damages for breach of covenant. It was also found that the apprentice's conduct would irritate his fellow workmen and lead to loss of employer's time.

Held, that the employers were not entitled to terminate the contract of apprenticeship and were liable for breach of covenant.

WESTON *v.* LONDON COUNTY COUNCIL, (1941) 1 All.E.R. 555 (K.B.).

Factories Act—Technical institute carried on by local authority—If factory under the Act.

A technical institute run by local authorities is not a factory within the meaning of the Factories Act and the local authority is not liable for an accident to a pupil of the institute while working a wood cutting machine. Where the pupil disobeyed the instructions given to him and brought about the accident there is no common law liability on the part of the local authorities carrying on the technical institute.

HICHENS HARRISON WOOLSTEN & CO. *v.* JACKSON & SONS, (1941) 1 All. E.R. 562 (K.B.D.).

Stock exchange—Brokers right to indemnity from vendors repudiating their contract.

Where the vendors repudiated their contract the brokers are bound to produce other stock which could be registered in the name of the buyer and the brokers are entitled to be indemnified by the vendors in respect of the liability they have incurred to produce other stock.

LANCASTER MOTOR CO. (LONDON), LTD. *v.* BREMITH, LTD., (1941) 2 All. E.R. 11 (C.A.).

Company in liquidation—Unsuccessful proceedings by and order for costs against—Bank account in liquidator's name—If can be attached.

Where there was an order for costs against a company in liquidation which took out unsuccessful proceedings, the persons entitled to costs sought to attach moneys in a bank account standing to the credit of the liquidator.

Held, that there was no relationship of banker and customer or debtor and creditor between the bank and the company and the amount cannot be attached.

(1936) 2 All. E. R. 905 not followed.

(1938) 2 K.B. 801 relied on.

JOTTINGS AND CUTTINGS.

Gray's Inn Hit.—For Grey's Inn bombs are no longer glass-case curiosities in the Library faintly recalling old unhappy far-off things and battles long ago. It has suffered like its sister Societies from this year's thunderbolts. Its gardens are pitted in several places with bomb holes of various sizes. The house where the gardener lived for more than twenty years is wrecked. Half the terrace railings are blown away, and a house in Gray's Inn Square has been hit. Verulam Buildings and Raymond Buildings have been damaged by blast and no part of the Inn has its glass intact. It is to be supposed that these misfortunes must be put down as accidental since at all times it would have been hard to bring the Inn within the definition of a military objective. "I hold your Walks to be the pleasantest place about London and that you have there the choicest society," wrote an Englishman abroad in 1621, and nearly two centuries later Lamb wrote: "They are still the best gardens of any of the Inns of Court, my beloved Temple not forgotten—have the gravest character, their aspect being altogether reverend and law-breathing. Bacon has left the impress of his foot upon their gravel walks". The gardens have, indeed, changed since Bacon planted there seventy-one elm trees at 9d. each, eight birch trees at 1s. 6d. each, sixteen cherry trees at 1s. each, woodbine, eglantine, roses, vine cuttings, pinks, violets and primroses (a hundred and twenty-five "standards of roses" cost him but 12s. 6d.). Though the lawns are still green and delightful, not for many years has that vanished fragrance perfumed the air of Holborn. It is long since peace, sometimes as destructive as war, levelled Bacon's Mount and the pleasant summer-house thereon, and later covered the site with the forbidding

bulk of Raymond Buildings. Lamb cursed the equally grim Verulam Buildings for an encroachment which left no trace of a one-time bowling green fenced with double quick-set "so that no cattle might come in".—*S.J., 1941, p. 20.*

The Square.—Gray's Inn Square is an excellent starting point for meditations on the rebuilding of London. Accustomed to streets which Victorian and modern commercial buildings have generally left with no features but pretentious disproportion and incongruousness, the eye finds it wholly delightful. How different architecturally was that vanished London in which it seemed unattractive, when Dickens penned his venomous attack upon its "ugly tile-topped tenements" calling it the "Sahara desert of the law". The lack of love that he had for the law clouded his judgment, and the great Sir Samuel Romilly, critical though he was of much in the legal world, so that the sight of his fellow lawyers spoilt New Square, Lincoln's Inn, for him, yet found his chambers at No. 6 Gray's Inn Square very pleasant and almost rural in 1779, with but one row of houses from there to Hampstead.—*S.J., 1941, p. 20.*

A Quaint Vice-Chancellor.—In the pages of various compilers of legal reminiscence many quaint stories have come down to us of Vice-Chancellor Malins; indeed, it was said of him that when in court he was always able to command a "good house," showing a certain amount of sport under the stimulating attacks of Mr. Glasse and Mr. Napier Higgins, who at that time were the chief protagonists in his court. Before reaching the Bench, Malins had for some time sat in Parliament, and every now and again when on the Bench he would allude to that fact despite its total irrelevancy; indeed, once we are told that, having oracularly interposed to say, "That reminds me of a point I once raised in the House of Commons," he got no further, for Mr. Glasse brusquely interposed with the withering sneer, "We have not come here to listen to your Lordship's experiences"—an observation which brought a flush to the Vice-Chancellor's cheek and a muttered interjection, but no more.—*L.T., 1941, p. 46.*

His costly garrulity.—We are told that on one occasion this failing of his cost him dear. It happened in this wise: arriving late in court, he explained that this was due to his having started for his morning canter in the Row without his watch, which accidentally had been left at home, and in consequence he had dallied longer in the Row than usual. An hour or so after this avowal of

the reason for the delay in taking his seat a person appeared at his Lordship's house and informed the butler that he had been sent from the court for the Vice-Chancellor's watch. Not unnaturally the butler was a little suspicious but, finding the watch on the Vice-Chancellor's dressing-table, and doubtless thinking that his master would be greatly inconvenienced without his time-keeper, he handed the watch to the pseudo-messenger, who quickly hurried off, but not in the direction of the Vice-Chancellor's court in Lincoln's Inn.—*L.T., 1941, p. 46.*

Baron Pollock.—Those who have passed the meridian of life may recall the somewhat ancient figure of the last of the Barons to remain on the Bench, Baron Pollock, a son of the former Chief-Baron, and few would have credited him with the cracking of jokes, but at least once he achieved success in this domain. The case on which he was engaged had reference to the subject of what constituted "necessaries" for a minor. The leader on one side was described by the narrator of the story as a rather decrepit and elderly Q. C. whose marriage to the somewhat mature daughter of a patrician house had occasioned a certain amount of ironical comment on the part of his learned friends. The other side was led by a silk much younger than his opponent and having over him decidedly the advantage in the matter of olive branches. During the hearing a good deal of badinage was indulged in, the old Q.C. contending that a piano constituted a "necessary", while his opponent maintained that it was not. The former began rather pompously to refer to his married experience, a subject which he was somewhat fond of introducing on account of the augustness of his alliance, and said, "I have always understood that a piano was a 'necessary' for anyone of the position the minor in this case occupies." Upon this his opponent rose and declared that he, having been married twenty years and being the father of a family, knew something about this, whereas his learned friend against him had not been equally fortunate, for he had no family. This brought the other to his feet with an indignant protest, but at this stage Baron Pollock quietly interposed and threw oil upon the troubled waters by remarking, "Gentlemen, I think we had better confine ourselves to the issue in this case".—*L.T., 1941, p. 46.*

BOOK REVIEWS.

THE LAW OF BENAMI TRANSACTIONS, by A. Ghosh, 3rd Edition, 1941. Published by Eastern Law House, Ltd., Calcutta, 386 pages. Price Rs. 5.

Benami transactions constitute a feature peculiar to Indian life around which has clustered a mass of case-law. The pre-

sumption of advancement arising in English law whenever property is purchased by a person in favour of his wife or child is no doubt inapplicable in India in the case of Hindus and Muslims, but there is in operation another principle, the doctrine of intention to benefit, by which it is permissible to show that the ostensible vendee is also intended to be the real and beneficial owner of the purchased property and not a benamidar or *alias* for the person who provided the purchase-money. The book under notice provides a lucid analysis of the judicial decisions under appropriate headings, serving to illumine the real position of the benamidar *vis a vis* the true owner and the outside world, and to explain the limits within which the doctrine of benami will be recognised by the Courts. Case-law down to 1941 has been noticed and the treatment of the subject is full and helpful. The book is bound to be of much assistance to the busy practitioner.

LAW RELATING TO COMPANY SHAREHOLDERS IN INDIA, by H.R. Mehrotra, G.D.A. Published by the Progressive Publishing Co., Calcutta, 1941. Price Rs. 3-8-0.

It was Ramsay Muir who remarked that at the present time ownership of property stands divorced from responsibility, that property has become essentially a matter of stocks and shares, that the control by shareholders is a fiction and that the directors, in effect electing themselves, wield enormous power often in an irresponsible manner. That the criticism is not unwarranted is borne out by a number of remarkable cases, like *Rex* v. *Kylsant, etc.* It is therefore eminently desirable, if not altogether imperative, that the shareholders should know their respective rights and liabilities, how their moneys are invested and applied and in what manner they can exercise effective control over the directors of a company and its policy. This book by Mr. Mehrotra affords the means of obtaining such knowledge as regards companies in India. The arrangement of topics in the book is on sound lines. The provisions of the Indian Companies Act, 1913 as amended in 1936, as affecting the shareholders are fully and faithfully explained and their implications lucidly brought out in the light of decisions, Indian and English. Appendix I which contains a summary of the various rights and liabilities of company shareholders is practically the essence of the whole book. The book is written in a simple style throughout and sets out in an admirable manner what every shareholder ought to know. We are sure that the book will prove useful not only to those to whom it is chiefly intended but also to the members of the legal profession.